

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LORENA MONTOYA ZAMORA,

CASE NO. 13cv1298-WQH-WMc

ner, ORDEP

GARY MICHAEL HOPKINS,

Respondent.

HAYES, Judge:

The matter before the Court is the Motion to Reopen Case and Motion for Attorneys' Fees filed by Petitioner. (ECF No. 18).

I. Background

On May 22, 2013, Petitioner filed a “Petition for Return of the Child to Mexico” in the Superior Court for the County of San Diego. (ECF No. 1-2).

On June 5, 2013, Respondent filed a Notice of Removal pursuant to 28 U.S.C. section 1441 to remove this action to this Court. (ECF No. 1).

On June 14, 2013, Respondent filed a “Motion to Dismiss Case Because It Has Become Moot” (“Motion to Dismiss”). (ECF No. 9). Respondent contended that the case had become moot because Respondent and the minor child at issue had “permanently returned to live in Mexico.” *Id.* at 4.

1 On June 14, 2013, the Court ordered that “[a]ny response to the Motion to
 2 Dismiss Case ... shall be filed no later than June 21, 2013.” (ECF No. 11). On June 25,
 3 2013, the parties filed a joint motion to extend the time for Petitioner to respond to the
 4 Motion to Dismiss. (ECF No. 12). On June 28, 2013, the Court granted the joint
 5 motion and extended the deadline for Petitioner to respond to the Motion to Dismiss to
 6 July 2, 2013. (ECF No. 13). The docket reflects that Petitioner did not file a response
 7 to the Motion to Dismiss.

8 On July 11, 2013, the Court granted the unopposed Motion to Dismiss (ECF No.
 9 9), dismissed the action without prejudice, and ordered the case closed. (ECF No. 15).

10 On August 6, 2013, Petitioner filed the Motion to Reopen Case and Motion for
 11 Attorneys’ Fees. (ECF No. 18). Petitioner requests that this Court reopen the case
 12 pursuant to Federal Rule of Civil Procedure 60 subsections (b)(1) and (b)(6) on the
 13 grounds of mistake, inadvertence, surprise, or excusable neglect. (ECF No. 18-1).
 14 Petitioner contends that her “mistake in failing to file a motion for attorneys’ fees before
 15 this [C]ourt prior to the dismissal is excusable as counsel mistakenly believed that an
 16 opposition to Respondent’s motion to dismiss the matter as moot would have been
 17 frivolous as counsel had confirmed that the child indeed had returned to her home
 18 state.” *Id.* at 2. Petitioner contends that this Court may award attorneys’ fees and
 19 expenses incurred by or on behalf of the petitioner pursuant to 42 U.S.C. section 11607.
 20 *Id.* at 3. Petitioner asserts that “attorneys’ fees can be awarded under circumstances in
 21 which the case has been dismissed as moot and thus there is no final judgment in the
 22 [petitioner’s] favor [when] the [petitioner] obtained the relief sought,” and cites in
 23 support several California state court cases that awarded fees pursuant to California
 24 Code of Civil Procedure section 1021.5. *Id.* at 3-5. Petitioner requests that this Court
 25 “grant an order for Respondent to pay the sum of \$15,750.00 of attorneys’ fees incurred
 26 by counsel for Petitioner,” and “costs and expenses in the amount of \$500.00.” *Id.* at
 27 5.

28 On August 9, 2013, Respondent filed a Response in Opposition to the Motion to

1 Reopen Case and Motion for Attorneys' Fees. (ECF No. 20). Respondent contends
 2 that relief from a final judgment under Federal Rule of Civil Procedure 60(b)(1) is
 3 unavailable on the ground of mistake for choices made "based upon an incorrect
 4 assessment of the consequences" (ECF No. 20-3 at 1, 5), and that "an attorney's
 5 ignorance or carelessness is not cognizable" as excusable neglect. (ECF No. 20-3 at 1-
 6 3). Respondent contends that Federal Rule of Civil Procedure 60(b)(6) is "used
 7 sparingly ... to prevent manifest injustice where extraordinary circumstances prevented
 8 a party from taking action in a timely manner to avert or correct an erroneous
 9 judgment," and "may not be applied where other grounds in Rule 60 do apply." *Id.* at
 10 6-7. (citation omitted). Respondent contends that Petitioner alleges "grounds
 11 specifically covered in Rule 60(b)(1), so[] these ground[s] cannot serve as a basis to
 12 reopen under Rule 60(b)(6)." *Id.* at 6-7. (citations omitted). Respondent asserts that
 13 an award of attorney's fees to applicants under the Hague Convention is not mandatory.
 14 Respondent contends that because the current motion is pending in federal court, "none
 15 of the [California] cases [Petitioner] cited in her motion can be relied on by this court."
 16 *Id.* at 7. If the Motion to Reopen Case is granted, Respondent requests an evidentiary
 17 hearing to address factors relevant to whether attorneys' fees should be awarded and the
 18 reasonableness of the amount of opposing counsel's attorneys' fees.

19 On August 30, 2013, Petitioner filed a Reply. (ECF No. 22). Petitioner contends
 20 that relief is available under Rule 60(b)(1) for her mistake in filing her request for
 21 attorneys' fees in state court because the mistake was reasonable and Petitioner acted
 22 in good faith. *Id.* Petitioner contends that the circumstances of this case warrant relief
 23 under Rule 60(b)(6) to prevent manifest injustice. *Id.*

24 **II. Discussion**

25 The sole legal authority for Petitioner's request for attorneys' fees is 42 U.S.C.
 26 section 11607(b)(3). Section 11607(b)(3) states: "Any court ordering the return of a
 27 child pursuant to an action brought under section 11603 of this title shall order the
 28 respondent to pay necessary expenses incurred by or on behalf of the petitioner,

1 including court costs, legal fees, foster home or other care during the course of
2 proceedings in the action, and transportation costs related to the return of the child,
3 unless the respondent establishes that such order would be clearly inappropriate.” 42
4 U.S.C. § 11607(b)(3). Even if the requirements of Rule 60(b) had been met, Petitioner
5 has failed to show that the requirements of section 11607(b)(3) are satisfied. Section
6 11607(b)(3) imposes “as a precondition for awarding costs that the court order the
7 return of a child.” *Allman v. Coyle*, 319 F. Supp. 2d 540, 544 (E.D. Pa. 2004)(internal
8 quotation marks omitted). Because Petitioner has not shown that this Court or any other
9 court “order[ed] the return of a child pursuant to an action brought under section
10 11603,” the Court has no authority to direct Respondent to pay the expenses incurred
11 by Petitioner. 42 U.S.C. § 11607(b)(3); *see Allman*, 319 F. Supp. 2d at 544 (“Because
12 I have made no such order in this case, I have no authority to direct [respondent] to pay
13 the expenses incurred by [petitioner].”).

14 **III. Conclusion**

15 IT IS HEREBY ORDERED that the Motion to Reopen Case and Motion for
16 Attorneys’ Fees is DENIED. (ECF No. 18). This case remains closed.

17 DATED: October 23, 2013

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19 **WILLIAM Q. HAYES**
20 United States District Judge

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